In the Supreme Court of the United States.

OCTOBER TERM, 1921.

CHARLES S. FAIRCHILD, APPELLANT,
v.
CHARLES E. HUGHES, AS SECRETARY OF State of the United States, and Harry M. Daugherty, as Attorney General of the United States, appellees. } No. 148.

APPEAL FROM COURT OF APPEALS, DISTRICT OF COLUMBIA.

MOTION TO DISMISS OR AFFIRM.

The Solicitor General moves the court to dismiss the appeal or affirm the decree in the above-entitled cause.

As grounds for this motion it is shown—

STATEMENT.

Without raising a direct issue on a specific statement of facts, but as a citizen and resident of the State of New York, and on behalf of himself and the members (who are taxpayers) of the American Constitutional League, organized "to uphold and defend the American Constitution against all foreign and domestic enemies" (Tr. 2), appellant, on July 7, 1920, filed an original bill in the Supreme Court of the Dis-

trict of Columbia for an injunction against the Secretary of State, his assistants, subordinates, and agents, to enjoin him and them from issuing any proclamation declaring "that the said so-called Suffrage Amendment has been ratified or that it has become a part of the Constitution of the United States" (Tr. 14).

On July 14, 1920, the Supreme Court of the District of Columbia dismissed the bill on final decree (Tr. 16). An appeal was allowed to the Court of Appeals.

On August 26, 1920, the Secretary of State issued the proclamation of the ratification of the nineteenth amendment, an event of which the court will take judicial notice, which was in full force and effect when the elections were held in November, 1920 (Tr. 21).

On October 4, 1920, the Court of Appeals affirmed the decree of the Supreme Court of the District of Columbia on authority of *Widenmann* v. *Colby*. (See similar motion, No. 92, this term, now pending (Tr. 40 and 41). This appeal was taken.

ARGUMENT.

Section 250, Judicial Code, provides:

> Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:
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> * * * * *

> Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.
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> * * * * *
>
> Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Only a moot question is presented. Plaintiff in error has shown no interest which involves the construction or application of the Constitution, or the validity or construction of any treaty, or the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States, or the construction of any law of the United States. The court will not decide "moot questions or abstract propositions." *California* v. *San Pablo & Tulare R. R. Co.* (149 U. S. 308, 314); *Taylor* v. *Taft* (203 U. S. 461); *Wilson* v. *Shaw* (204 U. S. 24); *Champion Lumber Co.* v. *Fisher* (227 U. S. 445); *United States* v. *Hamburg-American S. S. Co.* (239 U. S. 466, 475); *United States* v. *American-Asiatic S. S. Co.* (242 U. S. 537); *United States* v. *Alaska S. S. Co.* (253 U. S. 113).

JAMES M. BECK,
Solicitor General.

NOVEMBER, 1921.

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IN THE

Supreme Court of the United States.

CHARLES S. FAIRCHILD,
Appellant,

vs.

CHARLES E. HUGHES, as Secretary of State of the United States,

and

HARRY M. DAUGHERTY, as Attorney-General of the United States.

October Term, 1921.
No. 148.

Motion to Advance.

Now comes the appellant, Charles S. Fairchild, by Everett P. Wheeler, his attorney and counsel in this case, and respectfully moves the Court to advance this case on the docket of the Court and grant an early hearing thereunder, consecutively with the case; Oscar Leser *et al. vs.* J. Mercer Garnett *et al.*, No. 553 on the docket of the Court, for the following reasons:

1. Similar questions under the Constitution of the United States and involving the construction and application thereof as affecting the validity of the so-called Nineteenth Amendment and the application thereto of the Ninth and Tenth Amendments arise in both cases.

2. This case was brought in the Supreme Court of the District of Columbia before the Secretary of State issued his proclamation declaring the ratification of the Nineteenth Amendment by three-fourths of the States under Article V. of the Constitution. It was brought to restrain him from issuing the proclamation declaring such ratification and to restrain the Attorney-General of the United States from enforcing the provisions of the said amendment if it should be declared by the Secretary of State to have been ratified by three-fourths of the States and to have become an integral part of the Constitution of the United States. Process was served upon the Secretary of State and on the Attorney General before the said proclamation was issued and the Court has power which it should exercise to direct the Secretary of State to rescind the proclamation of ratification which he made *pendente lite* and with knowledge that the suit was brought to enjoin him from so doing. This proclamation now appears upon the official edition of the laws of the United States and is *prima facie* evidence of the existence and validity of the said Nineteenth Amendment.

3. The appeal in this case involves fundamental questions of Constitutional law, which it is in the interest of the people of the United States and of

the Government thereof to have finally decided and at an early day.

4. It involves the question whether the ratification of the Constitution by the thirteen original States was upon the condition that certain amendments to constitute a Bill of Rights should be adopted and become an integral part of that instrument, and should express fundamental rights of the States and the citizens thereof which could not be divested in the case of any State except by its consent.

5. It involves the question whether a State can be said to have the Republican form of government which is guaranteed by Section 4, Article IV. of the Constitution, when, without its consent, it is deprived of the right to regulate the suffrage within that State for the officers thereof.

6. It involves the question whether the said Nineteenth Amendment is beyond the scope of the power to amend, conferred by Article V. of the Constitution, and it involves an examination into the validity of the ratification of the Nineteenth Amendment by numerous State Legislatures. The Secretary of State held that he had no power to enquire into the validity of any such ratifications and refused to examine the same.

7. It is of great importance to each State in the Union and to the conduct by the election officers of elections therein that the validity of the said Nineteenth Amendment as a part of the Constitution of the United States should be determined before the general election which will be held in the said States in the month of November, 1922.

In support of this motion the appellant respectfully prays the consideration of the Court to the brief and to the supplemental brief heretofore filed in said case, No. 553, Oscar Leser *et al. vs.* J. Mercer Garnett *et al.*, in support of a petition by the plaintiffs in error therein for the issuance of a writ of certiorari. In these briefs many of the arguments upon the merits in both cases are stated at length. The other arguments in support of the appeal in this case will be stated fully in briefs to be filed hereafter on behalf of the appellant.

EVERETT P. WHEELER,
For Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

CHARLES S. FAIRCHILD,
Appellant,

v.

BAINBRIDGE COLBY, as Secretary of State of the United States, and A. MITCHELL PALMER, as Attorney General of the United States.

No. [redacted]148

Now comes the Appellant by Everett P. Wheeler, William L. Marbury and Alfred D. Smith, his attorneys, and moves the Court to advance the hearing of the appeal in this cause to such day as shall be fixed by this Court.

The following is a brief statement of the matter involved with the reasons for the application:

The plaintiff is President of the American Constitutional League, composed of members who are citizens and tax payers in ten States. On their behalf he filed his bill in the Supreme Court of the District of Columbia July 7, 1920. The Defendants appeared and moved to dismiss the bill July 13, 1920. A decree dismissing the bill was entered July 14, 1920. On the same day an appeal

was noted to the Court of Appeals. That Court on the 4th day of October affirmed the decree and Plaintiff immediately appealed to this Court.

The suit was brought to enjoin the Defendant, the Secretary of State, from issuing a proclamation declaring the ratification of this so-called Amendment, and to enjoin the Defendant, the Attorney General, from taking proceedings to enforce it.

The suit is based on these propositions:

1. The so-called Amendment limits the power of each State to regulate the suffrage for the offices of the State government. This right is a fundamental part of a republican form of government and of the rights reserved to the several States by the Ninth and Tenth Amendments. These amendments are a bill of rights which limit the power of amendment given in Article V.

2. The Amendment is therefore in violation of the guaranty of a republican form of government in Article IV, Section 4 of the Constitution.

3. The ratification of the Amendment by Missouri, West Virginia and Tennessee was a violation of the Constitutions of those States and not a lawful exercise of the power of the Legislature. These ratifications are therefore invalid.

Haire *v.* Rice, 204 U. S. 294.

4. The action of the Secretary of State, in issuing the proclamation is ministerial only. He has no power to ascertain either the facts or the law as to any ratification. Yet his proclamation is prima facie valid, and is treated as such in many States of the Union. The Court should therefore decide the controversy as to its validity.

5. The enforcement of the proclamation would work irretrievable injury to the members of the Association both as voters and as taxpayers. It could not be measured or compensated in damages and would give rise to a multiplicity of suits.

Inasmuch as the Defendant, the Secretary of State, pending the litigation and with full knowledge of it, has issued the proclamation of ratification, Plaintiff now asks a decree that he be required to revoke said proclamation and to issue a proclamation declaring that said Amendment has not been duly ratified and has not become a part of the Constitution of the United States.

The appeal involves the question whether the said Amendment, mentioned in the bill of complaint, is a constitutional exercise of the power to amend the Constitution, conferred by Article V thereof. It also involves the question as to whether the proposed amendment has been duly ratified in a legal and constitutional manner by the Legislatures of thirty-six States of the Union.

The questions of law incidentally involved are more fully stated in the briefs for the Appellant, which were filed in the Court of Appeals on the 9th day of September, 1920. Appellant also filed a brief in reply to the point made that the proclamation had been issued *pendente lite*.

These questions are of great public importance and it is very desirable in the public interest to have them disposed of, if possible, during the present month of October.

Counsel are aware of the order the Court has made respecting the advancement of the argument of several causes on the docket. But they respectfully submit that this cause, involving as it does the exercise of the elective franchise in many States, should have as early consideration as the

Court can allow. The questions involved relate to the election to be held in November. It is true they relate to all subsequent elections and also to the extent of the power of amendment conferred by Article V. If a majority of the States, under color of a federal amendment, can change the local government of the other States against their will, this would cease to be a federal republic. The power to amend would become the power to destroy.

These questions have not been determined by this Court. They deserve most careful consideration. Appellant is not responsible for the emergency which has arisen.

This Court is now asked, in the exercise of its highest prerogative, to protect the civil rights of citizens and taxpayers against the unauthorited acts of those claiming to represent them.

EVERETT P. WHEELER,
WILLIAM L. MARBURY,
ALFRED D. SMITH,
of Counsel for Appellant.

IN THE

Supreme Court of the United States.

CHARLES S. FAIRCHILD,
Appellant,

against

CHARLES E. HUGHES, as Secretary of State of the United States,

and

HARRY M. DAUGHERTY, as Attorney-General of the United States,
Appellees.

October Term, 1921.
No. 148.

MEMORANDUM IN REPLY, PRESENTED AND FILED ON BEHALF OF APPELLANT BY LEAVE OF THE COURT,

being

A Consideration of Several Cases.

Appellant's Brief, Point 11, page 46 and Brief Supplemental thereto, also involve this question in part.

Appellees contend in their brief, Point VI, that the question raised by Appellant is beyond the scope of the Judicial power.

It is conceded that the Judiciary is without power to decide political questions.

It is contended, however, that no one of the cases cited in the various briefs, is authority for the proposition that to construe the guaranty to every State of a Republican Form of Government, as constituting a contract justiciable in this Court, would constitute any innovation, or involve any departure from or limitation of, former rulings in this Court.

The cases may be grouped as follows:—

Luther vs. *Borden*, 7 *How.* 42 cited in *Taylor* vs. *Beckham No. 1*, 178 *U. S.* 548, as commented upon in *Pacific Telephone Co.* vs. *Oregon*, 223 *U. S.* 149 (Mr. Ch. J. White). "Speaking through Mr. Chief Justice Fuller",—"In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department." In all these cases a conflict had arisen within a State, and nowhere has it been determined that the United States may overthrow the form of any existing government either *de facto* or *de jure* and substitute another. Still less that it may establish a new rule where no controversy or disorder has arisen.

Mississippi vs. *Johnson*, 4 *Wallace* 475-498, wherein the Court limited its decision to the single point "Can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional?" Mr. Chief Justice Chase expressly so declares and all concur.

Georgia vs. *Stanton*, 6 *Wallace* 50, wherein Mr. Justice Nelson writes an opinion. Mr. Chief Jus-

tice Chase concurs in the conclusion "that the case made by the bill, is one of which this Court has no jurisdiction."

Thereupon the decision was:—

"Bill dismissed for want of Jurisdiction."

Nothing more was decided in that case, than was involved and contended, viz:—(page 53).

Following war and military occupation, the Secretary of War, the General commanding the Army and the General in command of a district, will not be enjoined from:—

1. Issuing any order, etc. as might be required under certain Acts of Congress, there involved.
2. Causing to be made any registration pursuant thereto.
3. Administering any oath thereunder.
4. Holding any election, as provided therein.

The acts in question recited "that no legal State Governments or adequate protection for life or property existed in States of Virginia, etc. *Georgia* etc. and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established" "divided the States named into five military districts" etc. (p. 50).

"It made it the duty of this officer to protect etc. *either* through the local tribunals or through military commissions" etc. (p. 51).

"It provided, further, that when the people of one of these States had framed a constitution in conformity with that of the United States, framed by delegates elected by male citizens, etc. of twen-

ty-one years of age and upwards of whatever race, color or previous condition'' etc. '' 'except such as may be disfranchised for participation in the rebellion' etc. and when such constitution should have been ratified by a majority etc. and Congress should have approved the same etc. and when the State by its legislature etc. should have ratified, etc. etc., then that the States respectively should be declared entitled to representation in Congress etc. and that until they were so admitted, any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control or supersede them.''

''The second of the two acts related chiefly to registration'' etc.

Georgia vs. *Stanton* accordingly decides:—

First.—That the Court had no jurisdiction to grant the relief prayed therein. The Chief Justice points out that the reasons set forth in the opinion are not necessary to the decision.

Second.—The Court will not enjoin the Secretary of War and Generals of the Army from conducting a referendum in a State which has been conquered and is held by military force, when that referendum is of the character described and for the purposes set forth.

Furthermore the acts there drawn in question show that Congress determined

1. That those acts were part of the war power.

2. That the procedure was justified solely as a war measure.

3. That a continuation of a war status pending a carrying out of the provisions of the acts, was necessary to prevent the arising of a *de facto* government which should become *de jure* and thereby oust Congress under the Constitution of all control.

4. That such status, as conquered territory might be perpetuated by a provision of the acts, to the effect that any civil government which might exist therein should be deemed provisional only, thereby cutting off all possibility of prescriptive right through lapse of time.

An application of the facts of that case and the implications therefrom, to the facts of the present case, is destructive of the contentions made on the part of the Appellees.

Rhode Island vs. *Massachusetts* as summarized in *Georgia* vs. *Stanton*, is worthy of notice.

Mr. Justice Nelson writes: (p. 72) "Mr. Justice Baldwin (12 Peters 736) etc. "As it is viewed by the Court, on the Bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles River, is the only question that can arise under the charter. Taking the case on Bill and Plea, the question is, whether the stake set upon Wrentham plain by Woodward and Saffrey, in 1842 is the true point from which to run an east and west line as the compact boundary between the States—In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid, neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals."

The present inquiry involves the construction of a written instrument, a contract of guaranty, and depends upon "the law of equity" applicable thereto;—competent parties good and valuable consideration, good faith, a meeting of minds and all the other elements of a good, valid equitable and meritorious agreement being present.

Again at page 73, Mr. Justice Nelson writes:—

> "He (Mr. Justice Baldwin) endeavored to show, and, we think did show, that the question was one of boundary, which of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case."

In that case the State of Rhode Island did not *own* the land involved and the question was one of boundary and jurisdiction by reason of a reserved sovereignty.

The question under the law of contracts is chief and controlling in the case at bar. It is one which may be determined as matter of law. There is no question of fact and the subject of the *franchise* is merely subsidiary, the occasion for the arising of the issue to be sure, but insignificant by comparison, with the determination of that great question,—following as a mere corollary, a solution of the main problem.

Questions arising by reason of contracts are the direct antitheses of political questions.

The two classes are mutually exclusive each of the other.

Contracts are determined by Courts, as matter of law. There is no room for political action.

for the contract is wholly without,—external to,—the political body. Political action results and eventuates in a contract, but the contract is not political, when made, nor is its construction or are the rights of the other party thereto.

Political action on the other hand is internal to the political body,—a part of its vital life and function,—and has no scope or effect beyond the bounds of the political power of the body concerned. All outside relations are governed by law or diplomacy as the case may be, a rule well understood and fully recognized in matters international.

From the Prohibition Amendment Cases, we may note as indicated by Judge Rellstab below, that a guaranty in the Constitution should be liberally construed to effect its purpose. "Words in the Constitution of the United States do not ordinarily receive a narrow and contracted meaning but are presumed to have been used in a broad sense with a view of covering all contingencies; In re *Strauss, 197 U. S. 324*—"The traffic in intoxicating liquor stands on an entirely different footing from the commerce in ordinary commodities" following Mr. Justice Harlan, in *Mugler* vs. *Kansas, 123 U. S. 623, 662.*

Thereupon Judge Rellstab proceeds:

> "To declare an amendment so ordained void on the ground that it runs counter to the *implied* limitations arising from the original document is frought with such dire possibilities that the power so to do by any other than the political departments of the government, may be well doubted."
>
> *Fiegenspan* vs. *Bodine, Record on Appeal to the Supreme Court, pp. 61, 63, 64 and 67.*

But so far as concerns the present inquiry, it is not necessary to hold or intimate anything whatsoever respecting *implied* limitations.

In *South Carolina* vs. *United States, 199 U. S., p. 454*, Mr. Justice Brewer writes:

> "In other words, in this indirect way, it would be within the competency of the States to practically destroy the efficiency of the National Government," etc.
>
> "Each State is subject only to the limitations prescribed by the Constitution, and within its own territory it is otherwise supreme. Its internal affairs are matters of its own concern—The Constitution provides that the United States shall guarantee to every State a Republican Form of Government, Article 4, Section 4. That expresses the full limit of control over the internal affairs of a State."

If this Court shall give effect to the view so expressed by Mr. Justice Brewer, the decision of the main question whenever had, must be as contended by appellant.

In *Texas* vs. *White, 7 Wallace, p. 237*, Mr. Chief Justice Chase speaking for the Court declared:

> "It is not unreasonably said that the preservation and maintenance of their (the State) Governments are as much within the design and care of the constitution, as the preservation of the Union, and maintenance of the National Government. The Constitution in all its provisions looks to an indestructible Union of indestructible States."

In *Lane County* vs. *Oregon, 7 Wallace 71, 76*, Mr. Chief Justice Waite:

> "Without the States in the Union there could be no such political body as the United States."
>
> "To them nearly the whole charge of interior regulation is committed or left: to them and to the people all powers not expressly delegated to the National Government are reserved."

Counsel for Appellant, accordingly respectfully submits to the Court for determination, the question raised by counsel for Appellees as to whether the controversy presented herein is such that the Court may adjudicate the same as arising under the guaranty of a Republican Form of Government.

To mention a great world movement toward judicial determination of questions arising between or among governmental organizations would be a work of supererogation before this Tribunal.

The framers of the Constitution of the United States were far ahead of their day and generation, in making provision for judicial determination of such controversies, but different times supervened.

Were various *dicta* found in old opinions, to be rewritten in Washington today, much reference to "political determination" and its inevitable international and interstate consequences, might be greatly modified or even omitted.

Nevertheless, we have been a people most fortunate. The United States have possessed a Supreme Court, the Balkan States have had none.

All of which is respectfully submitted.

WALDO G. MORSE,
Of Counsel for Appellant.

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